CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

June 15, 2005

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 9:53 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Phil Blair, Sheridan Downey, Eugene Huguenin, and Ray Remy were present.

Item #1. Public Comment.

None.

CONSENT ITEMS

Items #2, #3, #4, and #5.

Commissioner Remy asked to pull items #3 and #4 from the group of consent items.

Commissioner Downey moved approval of the following items in unison:

Item #2. Approval of the May 12, Commission Meeting Minutes.

Item #5. Failure to Timely Disclose Late Contributions – Proactive Program.

a. **In the Matter of Michael R. Kelly, FPPC No. 04-0145** (1 count).

b. **In the Matter of California State Pipe Trades Council Political Action Fund, FPPC No. 05-0122** (2 counts).

c. **In the Matter of John G. Morris, FPPC No. 05-0131** (1 count).

Commissioner Blair seconded the motion. Commissioners Blair, Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

ITEMS REMOVED FROM CONSENT

Item #3. In the Matter of Sidney E. Frank, FPPC No. 04/001 (10 counts) and
Item #4. In the Matter of Jeffrey P. Peace, FPPC No. 04/001 (10 counts).

Senior Commission Counsel Julia Bilaver explained that this case involved a liquor importer who laundered campaign funds to the local sheriff. After a thorough investigation, it was determined that Sidney Frank had made ten contributions to San Diego County Sheriff William

Kolender in violation of the Political Reform Act (Act) by using his personal staff to make the contributions in names other than himself with the assistance of his employee, Jeffrey Peace, an attorney in the state of New York. The stipulations propose a penalty of $40,000 against Mr. Frank and a $40,000 penalty against Mr. Peace. The Commission historically has treated campaign money laundering cases as the most egregious violation of the Act and has imposed the stiffest penalties on money launderers. Staff is not asking for the maximum penalty in this case because of the value of reaching settlement. This case is consistent with the way the Commission has prosecuted these cases in the past.

Commissioner Remy stated that he does not disagree that Mr. Frank or Mr. Peace are culpable or that money laundering is one of the most severe violations that one can do, or that the Commission is right in taking this action consistent with policy and precedent. He said he was concerned, however, that he does not have a sense that the gentlemen did these acts for any economic or personal gain. It appeared that they did it because they were supportive and friendly with the candidate. Also, if they had laundered $5,000 rather than ten $500 amounts, the act would have been the same, but the fine would have been $5,000 or $10,000 instead of $40,000 or $50,000. And, the fact that they engaged in multiple small violations is what makes the penalty as financially high as it is. It is also not clear whether Mr. Frank instructed Mr. Peace or whether the latter acted unilaterally. Mr. Remy said he thinks they should be fined, but an $80,000 fine is a little heavy when the fine would have been much lower had they committed the violation just a bit differently.

Ms. Bilaver responded that the reason why there are so many counts is because the respondents were trying to circumvent the local contribution limit. That alone affects the integrity of the election process in that county. There have been several cases in local, small jurisdictions, which have contribution limits of $100, where the Commission has aggressively prosecuted laundered contributions of $99. The Commission does this because such conduct is a deliberate attempt to violate local contribution limits and to thwart state disclosure laws by hiding the contributions. There may not have been a land use deal that Mr. Frank was pursuing, but he was trying to help the Sheriff, and he was doing so by violating the contribution limits.

Ms. Bilaver added that the determination of who was more culpable might be revealed at a hearing, but at this juncture, the respondents have both decided to take responsibility for what occurred rather than go to hearing.

Commissioner Remy asked what percentage of the campaign the $5,000 amount was.

Ms. Bilaver responded that during the reporting period in which the contribution was made to the Sheriff, $5,000 was at least 50% of the contributions that he received. She mentioned that the percentage is not something that staff considers. Instead, staff looks at the nature of the egregious conduct, which goes to the heart of the Act. The main purpose of the Act is to ensure disclosure of every receipt and expenditure.

Commissioner Downey observed that if it was a single $5,000 laundering action, the Commission would be limited to a $5,000 fine. That would be frustrating under the facts of this case, where there is a misreporting of the contribution and also the overt attempt to skirt the local campaign contribution limits. This is a top-rung violation, and when he first read this, he thought that the respondents should not be allowed any reduction in the fine amount. But, he understands the practicality of permitting a fine reduction for settlement. If this case went to a hearing, he would expect an administrative law judge to impose the maximum fine. The fact that there are two violators which increase the fines to $80,000 is a red herring. They each deserve to be fined for their own culpability. He said that he supports the stipulation as presented by staff.

Commissioner Blair clarified that Mr. Peace is an attorney. He said that fact makes this even more egregious than if he were not an attorney.

Chairman Randolph agreed with Commissioners Blair and Downey and added that this is a classic situation of trying to circumvent the fundamental purposes of a contribution limit. The fact that the contributions were so numerous is a result of there being a contribution limit that the respondents were trying to circumvent by making small contributions. The size of each contribution is less relevant than their conduct in circumventing the limits. She said she also thought that the respondents should pay the maximum fine, but she said she will support staff's recommendation of $4,000 per count.

Commissioner Blair asked whether he should abstain from voting on this item because he has been a past contributor to Sheriff Kolender, who is a personal friend.

General Counsel Luisa Menchaca said that it is not legal conflict.

Chairman Randolph added that Commissioner Blair can go ahead and vote.

Commissioner Blair moved to approve items #3 and #4 in unison. Commissioner Downey seconded the motion. Commissioners Blair, Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

INFORMATIONAL ITEM

Item #6.   Fair Political Practices Commission v. American Civil Rights Coalition, Inc. and Ward Connerly; FPPC No. 02/522.

There were no questions about this informational item.

ACTION ITEMS

Item #7.   Adoption of Amendments to Regulation 18570 – Return of Contributions with Insufficient Donor Information.

Executive Fellow Theis Finlev explained that this item includes amendments to regulation 18570 regarding return of contributions with insufficient donor information. The item was presented as pre-notice at the April meeting, and no comment letters were received since then. According to section 85700 of the Act, a candidate or committee shall return not later than 60 days any contribution of $100 or more for which they do not have the name, address, occupation, and employer of the contributor. Currently, the regulation does not deal with situations in which the contribution is returned but the contributor does not cash the check. The effect of this is that the money is left in the committee's bank account.

Mr. Finlev added that staff proposes that the regulation by amended to clarify that returned contribution checks which are not cashed within 90 days be turned over to the General Fund of the State or of the local jurisdiction if the contribution was made in connection with a local election. Under the proposed amendment, if after 90 calendar days the returned contribution check is not cashed, the committee then has 30 additional calendar days to turn the money over to the General Fund. Currently, subsection (c) of the regulation states that contributions that cannot be returned may be turned over to the local general fund. Under decision point (DP) 1, staff proposes that this regulation be amended to declare that such contributions *shall* be turned over to the local general fund. Mr. Finlev stated that DP 2 relates to whether contributions that are returned but not cashed *shall* or *may* be turned over locally. Declaring that they *shall* be turned over locally eliminates ambiguity regarding the manner in which committees return such contributions or turn them over to the general fund.

Chairman Randolph said that there are two decision points, which is to decide between the words "may" or "shall." The last time this was discussed, the general consensus seemed to prefer "shall."

Commissioner Blair moved to adopt the amendments to regulation 18570 with staff's recommendation of the word "shall." Commissioner Downey seconded the motion. Commissioners Blair, Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Item #8. Adoption of Amendments to Regulation 18452 (CalPERS Reporting Regulation) and Amendments to the Form 900 (Public Employees' Retirement Board – Candidate Campaign Statement).

Commission Counsel Galena West explained that these amendments relate to regulation 18452 regarding runoff elections conducted by the board of administration of the California Public Employees Retirement System (CalPERS). The six elected members of CalPERS are not selected in elections voted upon by the general electorate but are voted upon solely by particular constituent groups through a system of balloting by mail over a specific period of time. In 1998, section 84225 was added to the Act requiring candidates for the six elected board seats to file campaign statements including information required for other campaign statements, but only as it applies to board elections. This caveat limits the type of information reported and the number of reports. Currently, CalPERS candidates only file two reports per election year: a pre-election report and a post election report. Regulation 18452, adopted to implement section 84225 of the Act, provides the timing for these campaign statements as well as their content. Ms. West advised that in November 2000, CalPERS, by regulation, instituted runoff elections to occur in the event that there is no candidate obtaining a majority of the votes cast. CalPERS emergency regulation 554.6 became effective on Januray 16, 2002. In response to this, at the June 7, 2002 Commission meeting, regulation 18451, 18452, and form changes to Form 900 were presented for pre-notice discussion. The amendments and Form 900 changes were approved by the Commission without modification and set for adoption in August 2002. Subsequent to that meeting, the CalPERS regulation was subject to a court challenge. On June 14, 2002, the Sacramento Superior Court ruled that the CalPERS regulation establishing runoff elections was invalid, thus nullifying the regulation that the proposed amendments were intended to accommodate. Ms. West said that in January of this year, CalPERS staff notified the Commission that their runoff regulation had been redrafted in compliance with the court order and that these provisions for the runoffs could be used in this year's election cycle which starts in August. Because of this, regulation 18452 now needs modification to require a third report, so that CalPERS candidates separately disclose contributions and expenditures in connection with a runoff election. Otherwise, this information would not be available to the voters until January 10 of the following year. This change is also reflected in the amendments to the Form 900 and staff recommends that the Commission adopt these amendments. Ms. West added that CalPERS has reviewed the proposed changes and has no objections.

Commissioner Huguenin said that the filing deadline in both cases appears to precede the balloting by only two days. He asked whether "balloting" means the date when they are mailed out or when they are expected to be due, adding that this is a tight time period for voters to have access to this information. He asked how this works.

Ms. West responded that what Commissioner Huguenin said is true but that it is statutory. Section 84225 requires that the first pre-election report only go up to five days before the ballot period and be due two days before the ballot period begins. Statutorily, the Commission is limited with regard to when the pre-election report is due. Additional reporting requirements for a runoff election will help because it will show any activity that happened during the ballot period so that voters will have a little more information.

Chairman Randolph asked how long the balloting period is.

Technical Assistance Chief Carla Wardlow said she believed the balloting period is thirty days. The report is filed two days before the beginning of the ballot period which then runs for thirty days.

Commissioner Huguenin moved to adopt amendments to regulation 18452 and to the Form 900. Commissioner Downey seconded the motion. Commissioners Blair, Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Item #9. Adoption of Proposed Regulation 18530.7 – Extensions of Credit (Section 85307).

Commission Counsel Natalie Bocanegra introduced this item as a Proposition 34 regulatory project addressing section 85307. The Commission is being asked to adopt regulatory language addressing the term "extension of credit" as it pertains to the contribution limit rules. The issue is how to determine when a payment made consisting of the provision of goods or services becomes a contribution. Three interested persons meetings were held on this issue, and the Commission considered it at the April 2005 Commission meeting. At the April meeting, two versions were discussed by the Commission, an “ordinary course of business” approach and a “time-based” approach, and staff was directed to develop a regulation incorporating elements of both approaches for 85307(a).

Ms. Bocanegra said that subdivision (a) of the proposed regulation provides that the provision of goods or services is a contribution subject to section 85307(a) so that the contribution limits of Chapter 5, Article 3 will apply to those types of payments.

Commissioner Downey asked whether it is a contribution where the payment is not due until a later date and whether the due date consists of the date of the agreement or the date when the services were provided.

Ms. Bocanegra said that it is the date that the services are provided.

Commissioner Downey hypothesized that an agreement could be made in January for services due in June and suggested that this would mean the triggering date would be in June.

Ms. Bocanegra responded that the time a payment is received is the triggering date.

Commissioner Downey asked whether it is considered a defined contribution when the payment is not due for six months after the agreement.

Chairman Randolph inquired whether it would be an accrued expense.

Ms. Wardlow responded that the definition of “expenditure” in the Act says that one has made an expenditure when one makes a payment or receives the goods or services, whichever is earlier. So, while there may be an agreement to provide the goods or services, no expenditure has been made. She did not think that Mr. Downey’s scenario would become an extension of credit until either a payment or provision of goods or services has been made.

Commissioner Downey said that makes sense to him and that he wanted to be sure that the later date referred to the date that the services or goods are provided as opposed to the date of the agreement.

Ms. Wardlow added that under Mr. Downey’s scenario, the Commission would not require the disclosure of the item as an accrued expense.

Commissioner Blair asked whether, if one ordered printing to be delivered in June, and the printer asked for a 50% deposit due in January, the trigger date would be earlier because the expenditure of 50% is made earlier versus when the goods are delivered.

Ms. Wardlow responded that the deposit would be an expenditure at the time of payment, but there would be no further reporting obligation as an accrued expense until the goods are received. The trigger date would be the delivery of the goods.

Ms. Bocanegra added that in many circumstances, subdivision (b) would answer the question of what is the purpose of subdivision (a). The purpose of subdivision (a) is to state the general rule to guide the public on the application of contribution limits on the provision of goods or services that went on too long or is outside the ordinary course of business.

Commissioner Downey wondered if others may have the same confusion in reading subdivision (a). He suggested rewording the language to make the regulation more clear.

Commissioner Huguenin offered language to say "until after the goods or services are provided."

Commissioner Downey wondered whether it would be worth it to rewrite the language to make it more clear. He opined that one without any knowledge of what the statute is about is likely to tie the date of the agreement with the phrase "later date."

Chairman Randolph agreed that this could be clarified and suggested that this be done during the meeting.

Commissioner Downey suggested allowing staff to clarify this during a break in the meeting so that Commissioners could vote on it at the meeting.

Chairman Randolph agreed.

Ms. Bocanegra continued with subdivision (b), which she said narrows the application of subdivision (a) by specifying when an extension of credit is not a contribution.

Chairman Randolph mentioned her concern that subdivision (a) makes a very broad statement but that subdivision (b) creates a large exception to (a), but that subdivision (a) does not give any kind of notice that there is an exception coming in subdivision (b). She suggested that subdivision (a) could say "except as provided in subdivision (b)" in order to provide a road marker.

Ms. Bocanegra agreed. She continued to explain that under subdivision (b) there are two ways that an extension of credit will not be a contribution; these are exclusions to the general rule. Under subdivision (b)(1), if the payment for goods or services is made within a particular time period, then the extension of credit will not be a contribution. Under subdivision (b)(2), if the circumstances surrounding the extension of credit meet certain criteria, then the extension of credit will not be a contribution. The criteria attempt to capture situations where the transaction was in the ordinary course of business.

Ms. Bocanegra further explained that under subdivision (b)(1), the time period during which the payment must be made in order to get the exclusion is 45 days after the date of the invoice, or 45 days from the date the goods or services are delivered. For ongoing services, they must be billed no less than on a three-month billing cycle in order for the invoice date rule to apply.

Ms. Bocanegra stated that under subdivision (b)(2) an extension of credit will not be a contribution under criteria meant to distinguish situations where a vendor is merely conducting business as usual. The criteria are based on those presented to the Commission in April under the “ordinary course of business” approach. The first criteria is that the credit arrangement for the provision of goods or services is recorded in a written instrument. Second, it must be the primary business of the provider to provide similar goods or services. Then, the provider must provide the goods or services in the ordinary course of business and on the same terms and conditions offered to customers generally. Also, the provider must enter into the agreement with the intent that the candidate or committee be required to pay and also that the provider does not have the actual knowledge that the candidate or committee cannot pay. Lastly, the provider must make reasonable efforts to collect the full amount of the payment owed within four months of the date that the payment for the goods or services is due under the terms of the agreement.

Ms. Bocanegra added that decision point 1 (DP 1) presents optional language that the written instrument be signed by the candidate or its agent. Staff offered no recommendation on this decision point because on the one hand, the signature requirement could deviate from the regular practices of a business, and on the other hand, the documentation would show the facts of the agreement and that the candidate or agent clearly entered into the contract.

Ms. Bocanegra described decision point 2 (DP 2), which contains optional language stating that the reasonable efforts to collect the full amount of payment may be demonstrated even if the provider does not exhaust all legal options or accepts less than the full amount owed. Staff offered no recommendation on this decision point because the language is drafted to provide guidance on the concept of reasonable efforts. Currently, the reasonableness analysis depends on the totality of the circumstances. On the other hand, the Enforcement Division is concerned that the language could create a misconception that it would be okay for a candidate or committee to pay for only a portion of the bill. Any analysis would always require looking at all the facts so that if reasonable efforts were not made, it is likely that investigators would uncover that.

Ms. Bocanegra advised that the language under decision point 3 (DP 3), states that if the criteria of (b)(1) or (b)(2) are met, then it shall be a complete defense for the provider of goods or services in any Commission initiated enforcement action based on 85307(a), and it shall be evidence of good faith in any subsequent civil, criminal, or administrative proceeding. Staff recommends that this language be omitted because it is not necessary since the language has been restructured from the last meeting and might otherwise create confusion with how subdivision (b) would be applied.

Commissioner Downey said that he is satisfied with the approach and the substantive provisions and is ready to look at the decision points if other Commissioners are ready to do the same.

Chairman Randolph agreed but asked if there was any public comment first.

Chuck Bell, with Bell, McAndrews, and Hiltacht, commented that he agreed with the suggestions made to clarify subdivision (a) and thought it would be an improvement to the regulation. He further suggested that just below DP 1, subdivision (b) on line 21, to change the word “primary” to “regular” because it might be that the business of the provider is regular, but it may require an analysis to determine whether the activity is the primary business of the provider. It seems that the word “regular” would be a better word than “primary.” He further added that regarding DP 2, there are circumstances in which a provider, having provided goods or services to a campaign and not having been paid for that and having made some efforts to collect, accepts some reduced payment as a compromise based on the notion that some payment is better than nothing. He said that he thinks some accounting should be made for this and that he does not think it is an enforcement problem to include it. Lastly, under DP 3, Mr. Bell stated that he thinks clarity is always useful and that it is not a bar to enforcement in circumstances where one would say that if someone did comply with those provisions could not be prosecuted administratively or civilly for compliance with it. He said he understands the Commission’s enforcement concerns but does not feel as strongly about that point.

Chairman Randolph mentioned that she thought DP 3 should be removed because she thought it was more limited than what the regulation actually does. If she represented a provider, then she would argue that meeting the criteria is more than evidence of good faith, that if one meets the criteria then there is no contribution. It seems that it would be more clear to remove the provision.

Mr. Bell responded that if that is the view of the Commission on that point, then he would concede the point.

Ms. Bocanegra said she thought that was correct, that this provision was left over from when this regulation was structured as a presumption and extra clarity was needed.

Commissioner Blair advised that in the Commission’s last discussion about switching “may” to “shall,” it seems like the Commission should either strike this or put back the words “may be a complete defense.”

Chairman Randolph replied that she thought it should be removed altogether.

Commission Downey agreed. He further asked Mr. Bell about DP 1 and the requirement that the agreement be written.

Mr. Bell responded that the requirement may ensure that candidates are personally liable under the civil code for obligations, so vendors might be interested in that. Mr. Bell said he was not here representing any candidate, but there have been cases which held that where a committee is liable for an obligation when a candidate signs a document, that may implicate the candidate’s personal liability for it. But, typically, regular invoices do not need a signature; instead, the evidence of the invoice is sufficient. Usually, the presentation of an invoice is considered sufficient evidence of obligation. There may be a question of whether the person who contracted for the service was authorized to do so, but that is more of a civil or contract law question.

Commissioner Downey commented that this could throw a layer of practice in the political arena that does not exist in the commercial law arena.

Mr. Bell advised that the practice is mixed. For vendors who are consultants or providing personal services, it is more likely, and the audit practices of the FTB and the Commission's advice has been, to provide a written record. Usually, an invoice suffices and would not be subject to such a signature approval up front. Even after the fact, a treasurer will likely pay an invoice that is presented by someone who appears to have the authority to present that invoice to the treasurer.

Commissioner Blair opined that he cannot imagine that a business would accept a phone call and ship a considerable amount of goods without a purchase order or credit application or something that is signed.

Commissioner Downey suggested that if a company wanted to contract for services and have done so with another company in the past, a phone call would suffice.

Commissioner Blair responded that a contract would have already been in place in such a scenario.

Commissioner Remy asked whether, in the latter stages of a campaign when activity speeds up and an intern agrees to the provision of goods, that intern is considered an agent.

Mr. Bell said that if the intern had apparent authority, then the party providing the services would be bound.

Ms. Menchaca advised that the Commission would include a volunteer as an agent of the committee and this is what staff has advised in the past.

Ms. Bocanegra encouraged the Commission to consider smaller print shop situations where one goes in with a sample and picks up the copies later. Larger quantities may require a form with a signature, but this depends on the particular shop.

Commissioner Downey added that is a good example of political situations. He said he is leaning against requiring a signature and prefers to keep business practices the way they are.

Chairman Randolph commented that she is not sure how it benefits enforcement of the Act by requiring a signature except that it limits the general universe of provider activity that fits under this definition. She asked what the benefit was, from a practical standpoint, if all other criteria are met except the signature.

Ms. Bocanegra responded that it would not be required but could be helpful under the criteria listed under (b) through (d) relating to the intent of the provider.

Chairman Randolph added that she still does not see how it helps to have the additional signature.

Commissioner Huguenin said this refers to credit arrangements, not just the ordering process, and are separate agreements. If the providers want a rule that allows them an extension of credit without being considered a contribution, then a signature would be important. He added that it is good business practice to include such a signature.

Commissioner Downey observed that it is good business practice, but said that the issue here is what happens if a provider did not get a signature. He wondered whether the Commission should require it.

Commissioner Huguenin said he would vote aye but could still be persuaded to the contrary.

Chairman Randolph commented that it is clearly the better business practice and protection for the provider, but does not see a strong need for the Commission to mandate a signature.

Commissioner Blair said that it seems that this issue relates to smaller transactions since larger orders would likely require a signature. He added that it adds another layer of bureaucracy that the normal course of business terms would follow and he would be opposed to adding the demand for a signature on every transaction.

Commissioner Remy observed that if all other criteria were met except this one, then a provider would not be allowed the exemption because of the signature requirement.

Chairman Randolph suggested discussing the rest of the decision points.

Ms. Wardlow offered resolving the problem with subdivision (a) by adding "except as provided in subdivision (b), an extension of credit which consists of the *receipt* of goods or services pursuant to an agreement…" That way, it does not go into effect until the candidate or committee has actually received the goods or services.

Ms. Bocanegra added that this would incorporate the Commission's existing rules regarding when expenditures are made.

Commissioner Downey suggested staff discuss it during the break.

Chairman Randolph asked about the word "regular" versus "primary."

Ms. Bocanegra agreed that "regular" is appropriate.

Chairman Randolph said she has mixed feelings about DP 2. Originally, she thought the language should be included, however, reasonable efforts are reasonable efforts, which may include accepting less than the full amount.

Commissioner Downey added that he is very comfortable with requiring "reasonable efforts." The notion of accepting less is a daily occurrence in the commercial world. It is one way to compromise and collect a debt. He said he does not think the language is needed and that there should be flexibility in the regulation.

Chairman Randolph agreed.

Scott Hallabrin, with the Assembly Ethics Committee, stated that he was not speaking on behalf of anyone except himself. He explained that when he practiced law in private practice, he experienced non-paying clients and understands that providers extend a service fully expecting to get paid and do not get paid. At some point, the provider decides not to pursue formal collections because it is not worth the time or money to do so. He sees a problem with subdivision (d), requiring reasonable efforts to collect within four months of the date the payment is due. This might convert many providers into unwilling contributors when they never intended to make a contribution, simply because they did not act within the four month period of time.

Commissioner Downey responded that “reasonableness” likely would vary depending on the amount of the debt. He said he would not worry too much about the matter.

Mr. Hallabrin added that each situation has its unique set of facts.

Chairman Randolph said that having a shorter timeline is important because those who are monitoring the campaign need to know if there are contributions out there. If someone waits to collect, then that is something people need to know. She is comfortable with having a tighter timeline of four months in the campaign context.

Commissioner Remy opined that the general feeling is that if a provider does not threaten suit or attempts to negotiate, then that is okay. He wondered, however, if this language is omitted, how one would know that such situations are reasonable.

Commissioner Downey suggested researching the minutes of the meeting.

Commissioner Blair added that the reality is that such problem will arise when the candidate lost. If the candidate won, it is likely that the provider will be paid. If the candidate lost and there is no money in the campaign account, then the provider would likely have to write it off. He wondered whether anyone would care at that point and how the Commission would go after a provider who made their best effort to collect.

Chairman Randolph advised that only reasonable efforts are required, not best efforts. If the provider made reasonable efforts to collect, then the Commission would not go after them.

Ms. Bocanegra added that if a provider had a history of engaging in business with campaigns and not collecting, then that would establish a pattern and could speak to whether reasonable efforts were made.

Chairman Randolph asked whether anyone objected to removing DP 3.

There was no objection.

Chairman Randolph directed staff to take a break and return with language for DP 1.

Commissioner Remy asked whether the issue of a 45 day or 60 day standard is before the Commission.

Chairman Randolph responded that it is not before the Commission in the current draft but that Commissioner Remy could propose the concept of moving to a 60-day standard.

Commissioner Remy wondered how common a 60-day invoice is as opposed to a 45-day invoice.

Commissioner Blair said he thought the trend is toward 60 days, but the most common is still 30 days.

Commissioner Downey added that he is inclined to leave it at 45 days since that is the number present during pre-notice and no one complained about it.

Chairman Randolph observed that there has not been any objection to the 45-day standard.

Chairman Randolph directed staff to discuss DP 1 while the Commissioners continue with the agenda.

(Discussion of this item continues after item #12, the Executive Director's report.)

REGULATORY CALENDAR

Item #10. Regulatory Calendar – Work Plan Revisions.

Assistant General Counsel John W. Wallace mentioned a few additions. First, on page 1, section (a), item 1, the memo proposed to move the item further down the calendar, but staff now propose moving the item from July to September so that the proposed request would come before the Commission as a discussion item in September. Second, on page 14, section (c), item 2, regarding the project proposal for the Commission to begin designating decisions as precedential and to establish criteria for the Commission to use in making that determination, staff recommends moving the interested persons meeting from July to August.

Ms. Menchaca added that the pre-notice discussion on that issue would also be bumped by one month, so that pre-notice will be in October and adoption in December.

Commissioner Remy said he was not opposed to the move but wondered about the reasons for doing so.

Mr. Wallace responded that generally the move is due to staff resources. The legal division has a few new attorneys in training and have lost some attorneys to the Enforcement Division.

LEGISLATION

Item #11. Legislative Report.

Executive Director Mark Krausse had nothing to add.

Commissioner Downey said that he thought the other Commissioners would benefit from information that Commissioner Downey learned about the first two items in the legislative report from Mr. Krausse in an earlier conversation.

Mr. Krausse added that AB 709 and AB 938 are examples where the Democrats in the legislature decided that, since they could not get the two-thirds vote required for these bills, they would strip them of the two-thirds vote provision of the bill, submit them to voter approval, which does not require two-thirds vote of the legislature, and that would allow the substance of the bills to move the two issues forward. AB 709 imposes a statutory limit of $5,600 on candidate controlled ballot measure committees. To submit a bill to the voters, it must first be signed by the Governor. It would put the Governor in a difficult position to veto the bill, however, given that he took part in the litigation, Mr. Krausse said he is not sure that the Governor would have any problem vetoing the bill.

Mr. Krausse further stated that AB 938, which would seek earlier reporting of money spent to qualify ballot measures, will also be moved forward like AB 709. Both bills are now in the Senate and will likely pass easily there. The question is whether the Governor will sign or veto the measures.

Commissioner Downey asked when the measures would go on the ballot if passed and signed.

Mr. Krausse replied that the timing is a function of the Secretary of State's (SOS) office. The SOS sets deadlines and says that ballot measures cannot be added after a certain date; however, the legislature frequently goes beyond that date and the SOS nevertheless allows it on the ballot.

Chairman Randolph asked about the window of time when the Governor has time to decide whether to sign or veto a measure.

Mr. Krausse opined that if passed by the legislature and given to the Governor late enough, the measure could not make the ballot in time.

Commissioner Downey asked about the position on AB 709 and whether there will be communication with the Senate.

Mr. Krausse said that the Commission has a position on the subject matter of the original bill, but staff will not advocate for the bill because of the provision of the Act that prohibits Commissioners from taking positions on ballot measures or candidates and from making contributions. So, there will be no active representation on the issue at this time.

Commissioner Blair asked who decides whether to support or oppose a bill.

Chairman Randolph replied that staff makes a recommendation and the Commissioners accept or reject the staff's recommendations.

Mr. Krausse added that in rare cases, when a position is need prior to a Commission meeting, a legislative subcommittee, including the Chair and one other member, to take a position. However, that subcommittee does not currently exist since there has not been a need for it recently.

DISCUSSION ITEMS

Item #12. Executive Director's Report.

Commissioner Huguenin noticed that on one of the probable cause findings, the dates were more than five years ago. He wondered about the statute of limitations regarding a probable cause finding for bad conduct.

Mr. Krausse responded that the date the complaint was filed is key. Staff would likely not have ready access to that date on this particular matter. In general, the Commission has 5 years to pursue an administrative matter, and 4 years to pursue a civil matter. The filing of the probable cause report tolls the statute.

Chairman Randolph called a 5 minute break.

Item #9. Adoption of Proposed Regulation 18530.7 – Extensions of Credit (Section 85307).

(Staff returned with suggested changes to the regulation to continue the earlier discussion of this item.)

Ms. Bocanegra proposed that the language would read, "Except as provided in subdivision (b), an extension of credit which consists of a receipt of goods or services pursuant to an agreement between the provider of the goods or services and a candidate or committee, and where payment is not made until a later date, is a contribution subject to Government Code section 85307(a)."

Chairman Randolph asked why the change from "due" to "made."

Ms. Bocanegra explained that this would establish that in all instances, except where subdivision (b) applies, a contribution will result when a committee receives goods or services but does not pay for them at that time.

Chairman Randolph said she approved of the language and asked for a straw vote on each of the decision points.

On DP 1, which would require a signature on the written instrument, Commissioners Downey and Blair, and Chairman Randolph suggested they would omit the signature requirement.

On DP 2, regarding reasonable efforts, Commissioner Downey and Chairman Randolph suggested to omit the language. Commissioners Remy and Huguenin suggested to include the language of DP 2.

Commissioner Remy reiterated his position that he does not think people should reference the minutes two or three years from now in order to determine the intent of the language. There is no limiting reason why the regulation is not strengthened by including the language of DP 2.

Commissioner Blair said he would like to include the language as well.

On DP 3, Chairman Randolph stated that the Commissioners had already decided to exclude the language. She added that the word “regular” would replace “primary” as Mr. Bell suggested.

Ms. Bocanegra clarified that staff will also strike “notwithstanding subdivision (a)” on line 9.

Chairman Randolph asked whether anyone would like to make a motion to adopt regulation 18530.7 including staff’s proposed language of subdivision (a) reading, “Except as provided in subdivision (b), an extension of credit which consists of a receipt of goods or services pursuant to an agreement between the provider of the goods or services and the candidate or committee, and where payment is not made until a later date, is a contribution subject to Government Code section 85307(a);” excluding “notwithstanding subdivision (a)” on line 9; excluding DP 1 so that subdivision (b)(2)(a) would read “the credit agreement is recorded in a written instrument;” replacing “the primary” with “a regular” on line 21; including the language of DP 2 on page 2, lines 7-11 to clarify what “reasonable efforts” means; and removing the language in DP 3, lines 12-18.

Commissioner Downey moved to adopt the regulation as read by Chairman Randolph. Commissioner Blair seconded. Commissioners Blair, Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Item #13. Litigation Report.

General Counsel Luisa Menchaca had nothing to add.

Chairman Randolph called a 5 minute break.

Item #14. Discussion of New Strategic Plan.

Executive Director Mark Krausse said the Commissioners now have copies of the Commission’s 1998-99 strategic plan. He also mentioned the comment letter from Charles Bell, adding that the letter suggests that the Commission consider the McPherson Commission Report and recommendations. Mr. Krausse provided copies of the report for the Commissioners in addition to a matrix of what has since been implemented. He suggested three approaches to beginning the discussion of a new strategic plan: going over the list of implementations, going through the suggestions in his staff memorandum, or going through the last strategic plan to discuss the improvements made in each area.

Chairman Randolph said that she would prefer a forward-looking approach. It is helpful to look at the old strategic plan and the McPherson Commission recommendations and talk about new proposals to move forward.

Mr. Krausse explained that the McPherson Commission gave a presentation to the full Commission in 2001. In a number of instances, the recommendations were implemented and in other areas, particularly in the Enforcement Division, some recommendations were not implemented.

Commissioner Remy mentioned that Mark's memo gets to the discussion of looking at past goals and objectives and developing future goals and objectives and recognizing the underlying philosophy of the goals and missions of the Commission, which gets to the vision statement, which is important. He said that a few questions that come to mind before discussing the McPherson report: To what extent has the Commission added to the cost and complexities of government? Are there current goals that should be modified or eliminated or new goals that should be added? Does the Commission have adequate staff and financial resources to fulfill the expectations and mandates and if not, what are the options? Have the Commission's activities encouraged or discouraged participation in government activity and have they achieved progress toward achieving ethical behavior at the governmental level? He said that as the Commission address these issues of philosophy in how the Commission operates, it can then get into the specific recommendations of the McPherson Commission and past goals.

Chairman Randolph suggested that the Commissioners review the McPherson Commission report and matrix to discuss at the next meeting. She agreed with Commissioner Remy and suggested beginning with a general discussion of what Commissioners would like to accomplish with this process. She added that the Commission is always constrained by the Act and its goals, so it is difficult to look at whether the Commission is helping or hindering the political process without considering whether the Act is, in and of itself, a help or hindrance to the political process. Even if it is a hindrance, it is difficult to make changes to the Act through the legislative process. She suggested that the discussion occur in the context of the framework that is in place and discuss whether the Commission is effective in its administration of that basic framework and whether there are hindrances to the Commission's effectiveness that can be identified and dealt with, such as resources or even select provisions of the Act.

Commissioner Huguenin added that there is another piece that the Commission is charged with: that political activity in general is an evolving beast. It seems that the Commission must look at the world it is attempting to regulate and to share opinions about whether there are areas that require attention in the statute. The statute tends to change but with a backward view in curing things that seem to become problems because that is the only way to get a majority of the public or the legislature and the Governor to agree that something needs to be done. The Commission has the obligation to give notice that there are some things that need to be done. It would be helpful to look at the big picture and the smaller daily issues.

Chairman Randolph said that the two discussions are the macro discussion and the micro discussion. The larger, big picture review of the political process and whether the Act adequately serves the public in regulating the political process is one aspect of the discussion. The other aspect of the discussion are things like acquiring Attorney IV positions so that the Commission can retain current employees and recruit new ones. She asked for suggestions on how to structure a process that would include both of those aspects without one taking over the other.

Commissioner Remy reiterated that the Commission is constrained by the Act. He suggested looking at the tools available to the Commission that it could use to more effectively carry out its mission. Also, given the current tools, how effective is the Commission in carrying out its mission, even under the constraints, in terms of Commission performance and staff performance. This is not to say that either have fallen short or are critical, but whether there are things that need to be done and can be done given the realities of reduction in resources and growing performance expectations. He added that both the micro and the macro can be done and both are important to do. It is also important to get input from our community.

Chairman Randolph mentioned that her goal for this meeting was to set the course for the next few months. She suggested starting with a general discussion of Mr. Krausse's memo and the Commission's service areas to determine which topics should be agendized for the next meeting.

Commissioner Downey observed that each year, there is a work plan meeting with the Chair, staff, and one or more commissioners, where the important items are identified and dealt with. He wondered how this was different.

Chairman Randolph replied that this is more of a broader discussion, rather than smaller staff-level issues. This is a bigger picture discussion of legislative changes, recruitment issues, and resource issues, for example. It also involves the entire Commission. For example, the earlier discussion about money laundering and the fact that it is considered one of the worst violations is a reminder of how the Commission values certain notions. Having these types of discussions in these areas is useful. She said that it is useful to be as specific as possible and to focus on the areas of law that are most important in order to make it worth the time to pursue an issue.

Commissioner Blair added that it seems that most of the time, Commissioners are trying to plug loopholes, which makes the regulations more cumbersome. He suggested getting input from the "customers" who are the candidates and treasurers trying to follow the regulations. There may be a cumbersome regulation that does not provide much public benefit but makes being a treasurer or candidate very complicated. Perhaps the Commission could say. He would like to look at the benefit of some of the Commission's outcomes against the level of staff time used to get the outcome. He suggested taking a regulation that has been amended to fill loopholes and rewrite some of the language that is no longer important.

Chairman Randolph explained that the Commission did that in the conflict-of-interest regulations several years ago, and it was remarkable how much of the language stayed in the regulation. She added that her goal for this meeting is to create a list of items for the next Commission meeting. She asked whether there should be a Commission meeting dedicated solely to the strategic plan and what Commissioners would like to see discussed at the next meeting regarding the strategic plan. She suggested going through the McPherson Commission report as one agenda item.

Commissioner Remy agreed that it would be useful to have at least a significant portion of a future meeting that could be devoted to a discussion of the strategic plan. He suggested starting with a more focused philosophical discussion and adopt and reaffirm the mission and vision and add in any additional thoughts. From there, the Commission could discuss the specifics like the McPherson report, past goals and objectives, and the matrix. Then it could branch off and look at the different segments of the Commission's operation or overall involvement, with the ultimate hope that at the end, there would be an adopted strategic plan and a series of goals and objectives to provide a 2-4 year framework to guide the Commission. Perhaps then a particular segment may be reviewed more closely each year in addition to the regulation and rule setting. Then, there must be a section that deals with staff and monetary resources. He advised that the latter comes at the end, after everything else is laid out. In response to Commissioner Downey, the difference between this and an annual work plan meeting is that the Commission adopts a 4 or 5 year overall objective of where the Commission would like to go, and each year, the Chair and Executive Director present how well the Commission measures up to the plan.

Chairman Randolph mentioned that she disliked the previous strategic plan was that it was very wordy and cumbersome. It seems that the final product should be a brief, handful of pages with a 2-4 year straightforward statement of goals and objectives. She opened the floor to the public for comment.

Scott Hallabrin, from the Assembly Ethics Committee, commented that one of the great aspects of the Commission is its advice function, where the public can call here and get an answer quickly. This is done far better than in any other governmental agency. It seems that the two most important functions that the Commission does is its educational advice function and an effective and consistent enforcement program. It follows that the focus should be on these things in asking how to improve each of these functions and then look at how to make the necessary legislative changes. Under education, Mr. Hallabrin mentioned that his pet peeve is that Commission advice letters are not accessible on the web. One has to pay Westlaw or Lexis to be able to see an advice letter, whereas an Attorney General opinion can be accessed at the Library. This also puts Commission staff at a disadvantage as well because the Westlaw and Lexis letters only go back to a certain date. So, there is at least ten years of Commission advice that is not accessible.

Chairman Randolph recalled that the Commission was getting close to putting these letters on the web and wondered what happened.

Mr. Krausse responded that the biggest issue is reviewing letters for consistency, currency, and to ensure that no part of the letter has been de-published. It did not seem to serve the public to put the letters out there if a letter may have a bad rule of law in it. The Commission currently has the technical capability to do it; the search function is one that staff is trying to make more useful. Currently, staff is trying to develop and test an internal system first to iron out the kinks and improve upon it. It is an ongoing project that is a high priority.

Chairman Randolph suggested that it is not necessary to hold a separate meeting to discuss the strategic plan.

Commissioner Downey agreed that if the discussion is broken down into smaller capsules, then it would be okay to do at the Commission's regular meetings.

Chairman Randolph asked what the Commissioners thought about the Commission when they were first appointed.

Commissioner Blair said that when he was approached about his appointment, he had experienced working with several campaigns from a donor perspective and finance committee. It seemed that every move was in fear of the FPPC. In deciding to accept the appointment, he explained that it was important to him to simplify the process, make it less intrusive, and provide more big picture guidance, rather than micro-managing every move that a treasurer or candidate makes. He prefers to make the process less fearful for someone who volunteers to be the treasurer of a campaign.

Chairman Randolph mentioned that one area that the Commission has avoided is whether to look at the campaign reporting system in light of the new electronic reporting system at the state level. This might be an opportunity to modify the types of reports that are filed and their filing dates by gathering a working group of people who could take a fresh look at the campaign reporting process at the state level to consider whether there is a quicker, more efficient way to do it.

Commissioner Remy added that when he was appointed, he was advised by a couple of people that he was going to lose friends because this is not a popular place to be. It is daunting, but the objective to try and bring about a good standard of ethical behavior of campaigns, candidates, and donors is extremely important. But, this needs to be done in the context of not trying to discourage people from wanting to participate in the process of government and governance. He said he has heard a sample of people say that they do not want to get involved in the system. It is important to be sensitive in making a system that is less complex but that has heavy penalties and the tools to make the penalties heavy. The Commission must be sensitive to the fact that the average citizen, donor, or participant at local campaigns, as well as large state campaigns, are encouraged, not discouraged, from participating. That is a philosophical view that should guide the Commission in determining whether it is enhancing its effectiveness and not discouraging people from participating in governance.

Commissioner Downey stated that he had been a treasurer back in the initial days of the Act and thought that things were much simpler then. It soon became apparent, however, that professionals were needed to conduct a treasurer's duties. He agreed that the Commission needs to be cognizant of keeping things as simple as possible for the regulated community so that it does not discourage participation in the political process. He wondered what specifics will assist the Commission in getting where it wants to go. One place that the Commission seems to want to get is toward simplification for the regulated community, but the Commission must also abide by the policies underlying the Act.

Commissioner Blair commented that he remembered a local councilwoman who spoke before the Commission about her opponent who filed a complaint against her with the Commission. The investigation began in the middle of her campaign, and the local paper printed a story about it. She was eventually cleared. Her point was that the claim being made, while later invalidated, was very painful. Commissioner Blair said that expediency is important, and wondered whether there is a way that the Commission can diffuse the impact of a complaint pending an investigation until the person is proven guilty. A reputation may be ruined simply by the filing of a complaint.

Chairman Randolph stated that that is currently one of the things staff is focusing on internally. The goal is to get the Enforcement Division to a point where it can process a complaint within a year. The new Division Chief is working on processing through a backlog of cases and coming up with systems and procedures to try to get these cases moving faster. One thing that is unique to this Commission is that it is probably the first Commission to have a statewide election every single year of the current Chairman’s term. This is a significant resource issue since the Commission receives waves of enforcement complaints with each cycle. The question is whether the Commission will continue to receive the funding it needs to keep apace with changes in the law and elections as they come so that the Enforcement process does not leave anyone wondering what happened to their complaint.

Commissioner Blair added that it is easy for someone to file a complaint and wondered if there is some punishment for the person who made an unfounded claim.

Chairman Randolph said she did not know if that was a good idea.

Mr. Krausse suggested that the Enforcement Division has been doing the best they can to deal with the complaints that come in, but it needs to get to a point where they know how many cases are coming in and have a process for making a determination of whether to close or investigate a case based on the caseload at any one time. He said there may be several issues with giving a penalty for having filed a complaint that is not further investigated or proven to be a violation.

Chairman Randolph added that staff is now working on a system whereby staff will know its capabilities at any given time. She suggested to return to the next meeting with a specific agenda list of topics to discuss and asked whether there are any big issues that the Commissioners would like to see discussed.

Commissioner Blair asked Chairman Randolph to read out what she has heard and written down.

Chairman Randolph summarized that the list will likely include a discussion of the current mission statement, the agency description, the segments of the Commission’s operation, the McPherson Report recommendations and the Commission’s changes since the report was published.

Commissioner Downey commented that he was happy and impressed with Mr. Bell's letter and would like to get to the issues raised in the letter, especially the issues of duplicative major donor filings and enforcement streamlining practices. He also stated that he appreciates participation from the regulated community and would like to encourage even more participation from affected groups and the public.

Commissioner Remy added that he would like to see a layout of a proposed time frame and schedule by which certain areas will be covered, with an overall expectation that the final product can be ready for adoption by a certain date. That would also help indicate the topics to the various constituent groups so that the Commission may get input from them at the appropriate time.

Chairman Randolph agreed and suggested providing advance notice of the topics so that people would be aware of when they may want to participate. She asked if there was any additional comment from the public.

Chairman Randolph announced that closed session was cancelled.

The meeting adjourned at 12:15 p.m.

Dated: June 17, 2005

Respectfully submitted,

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Whitney Barazoto
Commission Assistant

Approved by:

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Liane Randolph
Chairman